# GMB Evidence to Matthew Taylor Review on Modern Employment Practices

## Introduction

GMB is the UK's third largest trade union with over 640,000 members. As a general union working across a wide range of sectors our members are drawn from public, private and third sector employees as well as including self-employed workers.

We welcome the opportunity to contribute to Matthew Taylor's independent review of modern employment practices at the request of the government. Our submission is based on:

i. Our collective day to day experiences representing members in a range of workplaces
ii. Positions determined democratically by our membership
iii. A qualitative survey of primarily GMB members between 24th November and 9th December into current experiences of work which attracted 866 detailed responses.
iv. Our experience in legal cases and pursuing justice on behalf of workers

It is GMB's view that:

- The current employment rights system is not fit for a 21st century workforce. Employment rights have not kept pace with the changing nature of the working world.
- Where employment rights do exist, the proliferation of short-term contracted and agency work effectively limits access to those rights for hundreds of thousands of working people. All workers merit employment rights from day one, if that were the case it would help to address insecurity and poor treatment of agency workers.
- The welfare state needs to be updated to provide greater social security for people who are self-employed.
- All too often the 'flexibility' of the so-called 'gig economy' is in the interest of the employer and in practice has a profoundly negative impact on the lives of workers.
- There are considerable numbers of falsely self-employed people who should be regarded in the 'worker category'.
- There is no convincing case for a new employment category,
- A much stronger inspection regime is required. Trade unions are part of the solution with workplace reps who can ensure laws are enforced and to help improve pay and working conditions. Workers should therefore have the right to invite unions to access workplaces to inform them of rights, laws and to represent and collectively bargain for them as well as ensuring employment law is correctly applied.
- HMRC has a responsibility to investigate companies suspected of using precarious forms of employment or bogus self-employment to avoid paying the correct level of tax. The current lack of transparency and willingness to investigate and pursue employers further incentivises exploitative behaviour.
- Unless workers can enforce legal employment rights then their practical value is diminished. Employment tribunal fees should therefore be abolished.

**Definitions of 'worker' and employment rights**

The existence of a contract of employment is the key to most employment protection and rights. This requires one or more of certain key elements:

- Personal service by the individual
- Control by the employer over the individual's work
- Mutuality of Obligation – the employer must be under a duty to offer work over a period of time and the employee must be under a duty to accept the work if it is offered

From the 1970s onwards, that there was emerging a class of individual who was economically dependent on the employer but lacked access to most statutory protections. In the late 1990s the Government acted to address this by defining a separate category of the 'worker' which included individuals who contracted to supply their personal services in a situation of economic dependence but who did not have sufficient stability or regulatory of work to be able to demonstrate employee status.

Workers have access to limited rights including:

- Minimum wage
- Working time
- Health and safety protections
- Some collective rights relating to freedom of association

Any changes to this definition of 'worker' should be with the clear intention of improving their rights and not providing employers with any additional opportunities to reduce their existing obligations to the people who currently work for them. GMB believes there is no case for any additional employment categories and instead the real issue is correct enforcement of existing categories.

**Casual and agency workers in the 'gig economy'**

It is important that the definition of the 'gig economy' doesn't distract from the longstanding issues of some employers seeking to escape their liabilities and responsibilities to the people they employ. False self-employment is one example of this with a significant cost to the Exchequer.

GMB wants to see an improvement in employment rights and conditions for all working people including those who are self-employed. We believe the definition of the category 'worker' has not been sufficiently applied to the many individuals it needs to. For example, GMB's ground-breaking case at the Central London Employment Tribunal on 20 July 2016 demonstrated that Uber drivers were entitled to receive a guaranteed minimum wage and an entitlement to breaks as a result of being deemed 'workers' and not falsely regarded as self-employed.

The 2016 judgement highlighted the 'faintly ridiculous' claims of some employers to avoid their responsibilities:

*'The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous. In each case, the 'business' consists of a man with a car seeking to make a living by driving it. Ms Bertram spoke of Uber assisting the drivers to "grow" their businesses,*

*but no driver is in a position to do anything of the kind, unless growing his business simply means spending more hours at the wheel. Nor can Uber's function sensibly be characterised as supplying drivers with "leads". That suggests that the driver is put into contact with a possible passenger with whom he has the opportunity to negotiate and strike a bargain. But drivers do not and cannot negotiate with passengers (except to agree a reduction of the fare set by Uber). They are offered and accept trips strictly on Uber's terms.'*

https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf

**Flexibility benefitting the employer**

Some businesses and commentators talk of the 'flexibility' of the 'gig economy', in our experience the flexibility is disproportionately one-sided in the interest of the employer with limited benefit for workers, if at all. The inability of people to know their working hours' days in advance results in many cases of people having difficulties in planning childcare, to budget or demonstrate earnings to access financial products and decent tenancy agreements. Instead it is a cause of stress and negatively impacts on family members as well.

**Updating social security**

GMB believes the welfare state needs to be updated to ensure that it serves the increasing number of self-employed workers better. Self-employed workers should receive statutory sick pay, holiday pay, employee pensions and maternity pay. We represent self-employed members from a wide range of backgrounds from private hire drivers to foster carers who are denied the conditions many other workers benefit from automatically.

**Exclusivity Clauses**

Unfortunately, the ban on the use of exclusivity clauses introduced in January 2016 will have limited practical effect. Few zero hours' contracts include such clauses, but for those that do, employers are likely to use terns commonly found in other boiler plate contracts in order to defeat the aim of the law. The reality is that employers can offer highly insecure on call arrangements because workers have little choice but to accept them, partly because of the way the social security system works.

**Employment status and continuity of employment**

The archaic rules about continuity of employment compound the problems associated with employment status so someone with many years of a relationship with an employer cam often lose out though gaps in the provision of work. Government should seek to change the statutory definition of continuity so that accrued service is not lost through breaks. GMB advocate the abolition of continuous service requirements altogether and provide for full employment rights from day one.

**Regular Work and Income**

Very few agency workers who have been agency workers for a sustained period of time, would willingly choose that arrangement over a permanent contract. Many companies argue for the flexibility agency work provides them with – and it does. It provides the flexibility to have workers when and where they want, for as long as they want. For the worker, this can often mean not knowing what hours they will work, the constant worry of an agency job ending with little notice and no recompense and it means fewer employment rights. When it comes to exercising the rights that do exist for agency workers, many such workers will choose not to 'make trouble' or demand their rights be enforced because their contract can be ended easily. This is a growing sector of the workforce and it is again a situation where flexibility for the employer means insecurity for the worker.

Government can introduce a statutory right to a fixed hours contract after a period of time has elapsed since the start of the employment relationship. Something similar already in terms of the right to request flexible working, but this would ensure that companies cannot keep workers on never ending agency contracts when they are, in effect, working a permanent job.

The employer should also be required issue the written statement of terms from day one to all workers – not just those that might be employees. At present the statement does not require the employer to give any specified working hours if none have been agreed. This could include setting out on call arrangements. The limitation with this is that it would not guarantee income when there is no work. Therefore, there should be a requirement for the employer to guarantee a minimum amount of work over a period of time such as by week or month.

**Treatment of agency workers**

Our survey of members has demonstrated a wide level of unhappiness at the way agency workers were treated. It is GMB's view that growing number of employers are using disproportionate numbers of agency workers because of their low level of rights at work, rather than because of an urgent short-term unplanned increase in demand. Recent research by Resolution Foundation indicates there are now 865,000 agency workers in the UK of whom 340,000 are employed on a temporary basis to meet a short-term demand.

http://www.resolutionfoundation.org/app/uploads/2016/12/Secret-Agents.pdf

The ongoing and use of vast numbers of agency workers is increasingly becoming a core part of business models which is not what was originally intended by policy-makers. GMB believes that ensuring all workers have rights at work from day one would significantly lower demand for agency workers and improve their job security. Government should legislate to restrict the proportion of agency workers that businesses can deploy at any one time – this would stop unscrupulous employers from manipulating the system.

**Zero hours contracts**

Workers with zero hours on the face of it have no mutuality of obligation and are thus not employees. But when such a worker is actually working they probably will have a contract of employment for a period of time – a spot contract. If between hirings they are under an obligation to make themselves available for work (it does not have to be in writing), they may have an "umbrella contract" spanning the

gaps between the periods of work. Some employers by way of a written agreement include "boiler plate" clauses designed to refute the existence of an umbrella contract. This could take the form of "obligations clauses" under which the employer makes it clear that it is under no obligation to provide work or with "substitutions" clauses which show that the worker by being able to substitute another person to perform the work does not undertake to provide their personal services (a pre-requisite for an employment contract).

GMB believes the average hours worked over the past 12 weeks should be deemed to be the contracted hours of work for those on zero hours as it already is for maximum hours of work under the Working Time Directive.

**Claiming employment protection**

Claiming employee or worker status is just one step to obtaining the protection of employment law. Most rights only apply after a minimum period of service. If there is a series of 'spot contracts' there may is no contract in force in the gaps. Therefore, it is difficult to access the most important employment protection rights for example unfair dismissal and redundancy which both require 2 years' continuous service. Even the right to a written statement of terms currently requires 1 month.

Under special statutory rules gaps between engagements can be counted towards continuity even if there is no umbrella contract if they are caused by a "temporary cessation of work" or in other words a fluctuation in demand for work of the kind in question. This is often the reason given by employers for offering work on a zero hours' basis and a tribunal can find that there is continuity in this situation. But in practice this can be difficult where the gaps between shifts or jobs are longer in general than time spent at work. Work sharing or job pooling arrangements where the employer shares out a limited quantity of work may fall outside the scope of this provision.

**Written Statements**

Employees are entitled to receive a written statement of their terms and conditions within 2 months of starting work if they have continuous service of at least 1 month. But if no fixed hours have been agreed the employer only needs to state this – there is no requirement to offer a minimum number of hours in a week or month or to schedule them at a regular time. All employees should be provided with a written statement of their terms and conditions on day one.

**Dismissal**

A zero hours' worker and one employed on a series of spot contracts may find it difficult to show that the cessation amounts to a dismissal as opposed to a failure to re-employ once more work becomes assailable (which would not be a dismissal). The ending of as fixed term contract or a task contract is a dismissal but the narrow definition of dismissal will favour employers where there is any doubt about the way in which the relationship came to an end.

**Minimum Wage**

The 'worker' idea was originally designed partly to address intermittent and casual working relationships to make sure they did not fall outside the scope of basic standards. Thus "workers" will in principle apply for minimum wage and working time. Time spent on call or waiting for work at the employer's instruction or request may count. But there are exceptions:

- Where the worker spends time on call at home when their home is at or near the place of work
- Where the worker by arrangement with the employer spends part of their on call time sleeping using the employer's facilities

These exceptions limit the usefulness of the on call provisions. There is also a question about travel time for both working time and minimum wage. Time spent travelling to and from home is usually excluded, as is time spent which is 'incidental' to the duties of the worker.

**Low numbers of workplace inspections**

According to FLEX (Focus on Labour Inspection] the UK has 'some of the worst inspection rates of any country in Europe with just 0.9 labour inspectors per 100,000 members of the workforce. In contrast compared with 4.6 in Ireland, 5.1 in the Netherlands, 12.5 in Belgium and 18.9 in France (FLEX, 2015, 3). The UK therefore has one of the smallest labour inspectorates in Europe....'

Government spending cuts to existing inspectors will only make their job harder.
http://www.labourexploitation.org/sites/default/files/publications/FLEXBISConsultationFINAL.pdf

**In the words of working people**:

Below is a small sample of the 866 responses from GMB members we consulted about the biggest issues facing people at work, including experiences of agency working and the impact on life outside work. Concerns with working conditions in their workplace was not confined to the private sector, job role, nationality or age group:

*'Low pay. Poor health and safety and a lack of getting basic working rights.'* [Ben, retail worker, Boston]

*'No flex, make it over time and not forced over time. It's wrong to work 50 hour shifts on nights [per week] and drive home. I have nearly crashed with being so tired.'* [Anonymous ASOS worker 1 – name protected by GMB]

*'I start work at 6am get up for 5am and am in work to gone 5pm most days. I am in a state of anxiety and take medication... having little money and only more hours with no overtime rates means that my family struggle. Relying on state support to make up my living wage whilst my employer continues to make huge profits. Have not been on holiday for 8 years.'* [Ann, retail worker, Cornwall]

*'Poor wages mean most people in my workplace live a hand to mouth existence, they suffer from physical and mental illnesses which are exploited by their employer as a way to justify poor wages.'* [Terence, Cornwall]

*'Low pay meaning overtime needs to be worked keeping us away from our families. Rights being stripped away.'* [Denis, production worker, Carlisle]

*'Shift pattern changes making it difficult to maintain a stable home life. Lack of communication from the company, especially about job security.'* [Chris, manufacturing worker, Telford]

*'The stresses put on workers is huge. We don't want to say no to our employer in case they cut our hours. I'm lucky I'm on a decent contract. There are many in my workplace on sub 20 hour a week contracts. They rely on overtime. When the company wants to cut on wages they are who are hit.'* [Chris, retail worker Huddersfield]

**When asked about experiences of casual and agency workers:**

*'Bullied, pushed too hard to achieve targets, treat as a commodity rather than a person, shown little respect'* [Sean, Barnsley]

'Agency/zero hours workers are walking a thin line in the workplace, because they have tremendous pressure hanging above them. They are always threatened by dismissal/release if they don't do their jobs right (or even if they do it), thus being the most physically and psychologically exploited workers.'

[ASOS worker 2, Barnsley – name protected]

*'Sitting by the phone waiting for a chance to feed your families is not acceptable'* [Gavin, Merthyr Tydfil]

*'They are often undermined by the employer and have so much uncertainty. They fear turning work down but are stressed with the amount of work they are being given. There is no way of knowing how many hours they actually are putting in as some have more than one employer.'* [Linda, Tameside]

*'I have had to defend agency workers who have been called in to disciplinary hearing for going to the toilet and on one occasion for sustaining an injury.'* [Vaughan, GMB workplace rep, West Sussex]

*'The ability to instantly cut the amount of hours an employee can be given leads to abuse as the employee cannot stand up to employer as they fear cut hours.'* [Julian, public sector worker, Portsmouth]

*'They get little or no rights at work. I have seen them not get sick pay, little notice of work being available or not and penalized when they can't pick up the hours at short notice due to child care or other similar reasons.'* [Shelagh, local government worker, South Yorkshire]

*'They are afraid to raise any issues and often will accept abuse or unfair distribution of work simply to keep a job. Disabled agency staff are particularly at risk and vulnerable with agencies seeming not to have policies around how bullying is managed. They should be forced to have these policies in place with proper mechanisms for managing any issues which arise. Employers should not be able to wash their hands of issues simply because they are agency workers and therefore someone else's problem.'* [Declan, local government worker, Baleymoney]

'My job is standing in one place, 8 hours a day sometimes 10 hours inducting clothes into an automation system. At the end of each day my feet and legs hurt. No one is allowed to sit unless they are pregnant.' [Anonymous ASOS worker 3, Barnsley]

**When asked about the impact of work on the rest of their lives, responses included:**

*'I work weekends and shifts so I don't often see my wife or family for full days. My wife and family have a 9-5 Monday to Friday jobs so we don't often have quality time together. I work 12 hour shifts which are always extremely busy and I often go over 8 or 9 hours without a break and regularly finish later than my scheduled finish time. This means that my first day off is spent catching up on sleep and feeling worn out.'* [Darren, Nottinghamshire]

*'No life outside of work! Always working on the same shift pattern, night shift, never a weekend off, no time to have a private life' [Anonymous ASOS worker 2, Barnsley]*

*'Work life infringes on my ability to see family and friends, and I find I am too tired to do much on my days off.'* [James, retail worker, Preston]

*'Once my bills are paid I have no disposable income to have any, extras, fun. I am too exhausted to have any energy left to socialise.'* [Trish, Plymouth]

*'Stress levels are the major worry. I work so hard during the week that I have nothing left at the weekend. It has a negative effect on my relationships too, as I'm often too tired to socialise and can be easily irritated due to tiredness.'* [Andrew, Southwark]

The responses from the survey indicate a deep unhappiness with the growing insecurity of jobs and the toll it takes on individual lives. There are clear concerns at the two-tier employment experiences between employees with a permanent contract and those employed on a short-term basis or through an employment agency.

Even permanent members of staff reported greater pressure and demands by managers outside of paid hours often resulting in increased stress and mental health issues. In the public sector the

consequences of redundancies and budget cuts while demand increased has resulted in unmanageable workloads.

**The role of trade unions**

The government must bear responsibility for the health of the UK labour market. Public policy shapes the legal environment in which employers operate. This has consequences in workplaces around the UK.

Trade union workplace reps help give workers a collective voice and speak out in insecure workplaces without fear of reprisal. Reps help negotiate as greater investment in skills, push for improvements in health and safety, collectively bargain for fairer pay and conditions and contribute worker's insight to decision-making when consulted. Employment laws are important and can make a profound difference. However, if they are not enforced on the ground then they are in practice worth less. Having union-trained reps familiar with employment law helps ensure businesses don't fall foul of the laws in the way they treat workers.

More and more workplaces would benefit from trade union reps and agreements to work with trade unions. It can be good for the businesses as well as for the employees, society and the economy as a whole. Yet the employers that flout employment law the most, exploit their workers and create a stressful working environment have the most to hide. They often do the most to prevent trade unions from speaking to their workforce or represent their members on the site. GMB believes that every worker should have the right to invite a trade union to their workplace and join a union without any resistance.

The recent discussions of the merits of a worker voice in the boardroom and/or on Remuneration Committees are welcome, however this alone will be insufficient without a voice on the shop floor through their trade union. The Conservative Party's recent announcement that it will not even require the involvement of a worker on company boards but rather a non-Executive Director responsible for speaking to workers is wholly inadequate.

**Employment tribunal fees**

The introduction of employment tribunal fees has resulted in a significant reduction in people seeking justice at work. The government's own figures show that the number of multiple claims taken to employment tribunals fell from 5,847 to 1,740 in the year following the introduction of fees. This represents a 70% drop between 2013/14 and 2014/15.

GMB believes it is unacceptable that workers face paying a £120 fee to take matters of unfair dismissal, discrimination, equal pay and whistleblowing to an employment tribunal. Employment tribunal fees should be abolished in their entirety.

Whatever rights workers are entitled to, if they are unable to enact and enforce them by law then their practical value is significantly diminished.

**Conclusion**

While there is greater interest and growing awareness of the 'gig economy' it is important that this is not at the expense of other forms of precarious work in the labour market. The need for enforcement of existing rights is fundamental to ensuring fair and improved working conditions for workers in the UK.

Trade unions and workplace reps play a vital role in upholding employment law. Crucially, a fair and level playing field will also benefit those employers who stay within both the law and the spirit of the law.

GMB looks forward to providing supplementary information and respond to any requests for further information to support this review.

For further information contact